

In The Matter Of:
United States vs.
PFC Bradley E. Manning

Vol. 28
August 5, 2013
UNOFFICIAL DRAFT - 8/5/13 Afternoon Session

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Min-U-Script® with Word Index

1 VOLUME XXVIII

2 IN THE UNITED STATES ARMY

3
4 UNITED STATES

5 VS.

6 MANNING, Bradley E., Pfc.

COURT-MARTIAL

7 U.S. Army, xxx-xx-9504

8 Headquarters and Headquarters Company,

9 U.S. Army Garrison,

10 Joint Base Myer-Henderson Hall,

11 Fort Myer, VA 22211

12 _____ /

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15 The Hearing in the above-titled matter was
16 continued Monday, August 5, 2013, at 2:30 p.m., at Fort
17 Meade, Maryland, before the Honorable Colonel Denise
18 Lind, Judge.

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DISCLAIMER

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17 colloquy due to being inaudible by the reporter.

UNOFFICIAL DRAFT - 8/5/13 Afternoon Session

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1 APPEARANCES:

2

3 ON BEHALF OF GOVERNMENT:

4

MAJOR ASHDEN FEIN

5

CAPTAIN JOSEPH MORROW

6

CAPTAIN ANGEL OVERGAARD

7

CAPTAIN HUNTER WHYTE

8

CAPTAIN ALEXANDER von ELLEN

9

10 ON BEHALF OF ACCUSED:

11

DAVID COOMBS

12

CAPTAIN JOSHUA TOOMAN

13

MAJOR THOMAS HURLEY

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PROCEEDINGS,

THE COURT: Court is called to order.

Major Fein, please accounts for the parties.

4 MAJOR FEIN: Your Honor, all the parties in
5 the Court last recessed are again present, with the
6 exception of Captain Overgaard.

7 THE COURT: Okay. I have been handed a
8 copy of Appellate Exhibit 635, which is a Stipulation
9 of Expected Testimony of Special Agent David Shaver.

10 Did both sides come to agreement with
11 regard to the stipulation?

12 MAJOR FEIN: Yes, Ma'am.

13 MR. COOMBS: Yes, Your Honor.

14 THE COURT: Pfc Manning, we have been
15 through this before.

THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Is that your signature there on
18 the bottom of, bottom right corner of the Stipulation
19 of Expected Testimony for Special Agent David Shaver?

THE DEFENDANT: Yes, Your Honor.

21 THE COURT: Before signing the Stipulation,

1 did you read it thoroughly?

2 THE DEFENDANT: Yes, Ma'am.

3 THE COURT: Do you understand the contents
4 of the Stipulation?

5 THE DEFENDANT: I do, Ma'am.

6 THE COURT: Do you agree with the contents
7 of the Stipulation?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Before signing the Stipulation
10 did your Defense team explain the stipulation to you?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Do you understand you have an
13 absolute right to refuse to stipulate to the contents
14 of this document?

15 THE DEFENDANT: Yes, Ma'am.

16 THE COURT: You understand that you should
17 only enter into a stipulation only if you believe it's
18 in your best interest to do that?

19 THE DEFENDANT: Yes, Ma'am.

20 THE COURT: You understand this is a
21 stipulation of expected testimony. Once again, what

1 that means is, when counsel for both sides and you
2 agree to a stipulation of expected testimony, you're
3 agreeing that, if Special Agent David Shaver were here
4 in Court and testifying under oath, he would testify
5 substantially as set forth in Appellate Exhibit 635.

6 A stipulation can be -- does not admit the
7 truth of a person's testimony. The stipulation can be
8 contradicted, attacked or explained in the same way as
9 if the person was testifying in person.

10 Do you understand that?

11 THE DEFENDANT: Yes, Ma'am.

12 THE COURT: And knowing everything I have
13 told you and your Defense Counsel has told you, do you
14 still want to enter into the stipulation?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: All right. This is not
17 admitted into evidence. This is an Appellate Exhibit
18 that I will consider for purposes of this motion.

19 So we have three motion here. Are the
20 parties ready to argue? Let's start with the motions
21 to merge Specifications 4 and 6 of Charge 2 for

1 findings.

2 MR. COOMBS: Yes, Your Honor.

3 THE COURT: Before you start, I do have a
4 question. Where is my evidence that this -- that the
5 acts in Specifications 4 and 6 happened at the same
6 time and same date?

7 MR. COOMBS: Yes, Your Honor. And that's
8 where Special Agent David Shaver's stipulated expected
9 testimony will come in handy.

10 The evidence that you have essentially was
11 the SigActs from both Iraq and from Afghanistan were
12 taken from the T-SCIF and ultimately placed on a SD
13 card.

14 And the evidence was that the dates for the
15 last written date on the SD card were 5 January 2010
16 for the Iraq SigActs and 8 January 2010 for the
17 Afghanistan SigActs.

18 The important fact to note is, that's the
19 last date when something was changed. Not the date in
20 which those items were placed on the SD card. So, in
21 other words, you could have a CD in the SCIF that you

1 have taken all the SigActs up to December 31st of 2009,
2 which is, that's the evidence. And you burned all that
3 on 3 January 2010. And that CD stays in the SCIF.

4 You do the same thing up to December 31st,
5 2009, for all the Afghanistan SigActs and you burn a CD
6 and that CD is burned on 8 January 2010.

7 THE COURT: So you are arguing to me that
8 as it leaves the SCIF everything is legitimate and is
9 not part of the theft.

10 MR. COOMBS: That's correct. We have got
11 plenty of evidence from the witnesses who testified
12 that there was no prohibition on saving this
13 information or any other information that you wanted
14 from SIPRnet onto a disk.

15 Now you do have -- here you don't even have
16 the use of a Wget or anything like that. You have a
17 legitimate export monthly of Excel SigActs which
18 again --

19 THE COURT: I have to assume. If I don't
20 find an intent to steal on the 3rd January and on the
21 7th of January, right?

1 MR. COOMBS: Right. If the idea -- if the
2 Court was convinced based upon the evidence that the
3 intent to steal was done at the time these things were
4 being pulled month by month, I guess that could even go
5 back to sometime when he initially started saving them.

6 But I think the evidence shows, and Chief
7 Hack's testimony helps support this, that Pfc Manning
8 was one of those individuals who was very, very
9 organized, saved an immense amount of information and
10 files.

11 And also from the testify of Captain Fulton
12 who was given a task of going back for the last year
13 going through the SigActs and pulling them in order to
14 discern the attacks on the brigade over the past year.

15 So he was pulling stuff for the general
16 purposes. I think the evidence would be more
17 supportive of the idea that he was pulling all these
18 because he could, and exported bimonthly, just have
19 them all on the CD.

20 And the actual taking from the T-SCIF back
21 to his CHU, that what's important from Special Agent

1 Shaver's testimony in that those dates don't mean
2 anything with regards to when it was put on the SD card
3 car, because the last written date would not change.
4 It would stay the same unless somebody went in and
5 altered a period or did some modification. And then
6 you would have a change.

7 So, as Special Agent Shaver testified in
8 the Stipulated Expected Testimony, he has no way of
9 knowing whether or not that was done on the SIPRnet or
10 the personal Mac computer and no way of knowing the
11 date, the exact date which was moved to his personal
12 Mac computer.

13 So just as there's no, I guess, argument
14 with regards to Specifications 5 and 7, that they were
15 given on the same date and time, the Government's
16 position, or, excuse me, the Defense's position is that
17 the evidence elicited by the Government and on cross by
18 the Defense, and through this Stipulated of Expected
19 Testimony would support that the taking of the SigActs
20 were done at the same time as well.

21 THE COURT: Talk to me once again. We have

1 got the contents of Prosecution Exhibit 50. They have
2 got the last written date on 1-8, January 8th for the
3 Afghanistan events and January 5th for the Iraq events.

4 What is the significance of that versus the
5 last paragraph, when you're talking about the 30th of
6 January?

7 MR. COOMBS: When you have the two last
8 written dates, that's the last time something was
9 modified. And you can't tell if that was done in the
10 T-SCIF or that was done on Pfc Manning's personal Mac
11 computer.

12 So there is no way of knowing that. All we
13 know, those were the last dates that that dataset was
14 modified in some way.

15 The 1-30-2010 date, the Government is
16 saying that because his computer was wiped on the 31st,
17 that we know it must have gotten on his computer by the
18 30th. That is their belief. And that's what Special
19 Agent Shaver would testify to.

20 THE COURT: All right. I think I
21 understand the Defense's position. Why don't we go all

1 the way through the Defense's arguments here and then
2 I'll switch over to the Government.

3 MR. COOMBS: Sure, Your Honor. 5 and 7
4 very straightforward. We agree that occurred on the
5 same date and time. The Government doesn't object to
6 merging them for sentencing, but does object to
7 findings --

8 THE COURT: Let me ask you a question on
9 this one. You haven't asked me to merge them for
10 sentencing. Should I not merge them for findings,
11 Specification 4 and 6 and Specifications 5 and 7,
12 Charge 2. Do you want me to consider them as one for
13 sentencing?

14 MR. COOMBS: I did ask for my Category 1
15 Offenses, I asked to merge 4, 5, 6 and 7 into one
16 specification. But then, in a footnote in my motion,
17 my UMC motion, I have already asked that you combine 4
18 and 6 for findings and 5 and 7 for findings.

19 So I guess, if the Court didn't do 4 and 6
20 or 5 and 7 for findings, then my request for sentencing
21 would be combine those four into one.

1 And that really kind of gets us then to the
2 UMC for sentencing motion.

3 THE COURT: Maybe I'm not understanding
4 your motion. Let me make sure I -- so in Category 1,
5 is your unreasonable multiplication for sentencing. I
6 thought you were asking me for three separate
7 Specifications -- 4, 5, 6 and 7 and 8 and 9. So
8 basically considering each of those pairs as
9 unreasonable multiplication of charges. You want me to
10 consider all six of them as one offense?

11 MR. COOMBS: No, Your Honor. 4 and 5 and 6
12 and 7, so I divided up between the 641 and 793 offense.
13 And then for 4, 5, 6 and 7 I said combine them into one
14 offense.

15 THE COURT: Where did you say that? Maybe
16 I'm confused.

17 MR. COOMBS: On the conclusion 9A, Page 4,
18 Ma'am.

19 THE COURT: Okay. All right.

20 MR. COOMBS: So with regards to the
21 Category 1 you have the 641 offense, the taking, and

1 the 793 offense, the giving of the information to an
2 unauthorized individual.

3 So, the Defense's argument is essentially
4 that 4 and 5, 6 and 7, and 8 and 9 is essentially
5 rolled out of a single ongoing act and part of the same
6 impulse. The exact reason in U.S. v. Campbell.

7 THE COURT: So now you want 8 and 9, 4, 5,
8 6 and 7?

9 MR. COOMBS: No. I just combine those
10 because they are 641 and 793 offenses. 4 and 5 in one
11 offense. 6 and 7 in one offense. Then in my
12 conclusion combine those into one, 8 and 9 into one
13 offense.

14 THE COURT: Okay.

15 MR. COOMBS: And the reason why is because
16 they are part of that single ongoing act of the actual
17 taking in order to give to an unauthorized individual.

18 And here I think -- and this also kind of
19 applies to the 641 offense in Category 2 of
20 Specification 12 and Specification 13 for the 1030A1.
21 The Defense's argument there is similar, in that you

1 have an ongoing act. In order to actually give it to
2 an unauthorized person, you know, unauthorized access,
3 the taking of that is the single ongoing course of
4 action.

5 When you look at the Government's filing in
6 Appellate Exhibit 599, that was their initial response
7 to the 917 motions. The Government consistently argued
8 that the theft of the records was tied to the actual
9 unauthorized disclosure of the records.

10 And I'll just highlight for the Court to
11 look at on Page 14 of Appellate Exhibit 599 and Page 16
12 of Appellate Exhibit 599, just a couple of the
13 Government's statements.

14 So --

15 THE COURT: What exhibit?

16 MR. COOMBS: Appellate Exhibit 599.

17 THE COURT: Are you looking at their
18 current?

19 MR. COOMBS: Appellate Exhibit 599 is
20 their --

21 THE COURT: I thought I had Appellate

1 Exhibit 58. Maybe I'm confused.

2 (Pause)

3 MR. COOMBS: Handing the Court 599. That
4 was the Government's response to the 917 motion.

5 THE COURT: 917. Okay. Got it.

6 MR. COOMBS: If the Court goes to Page 14
7 of Appellate Exhibit 599. Right underneath B1 where it
8 says, accused acts constitute theft of United States
9 Government records.

10 THE COURT: I'm sorry. Tell me where you
11 are again.

12 MR. COOMBS: Right under the indented
13 Number 1, accused acts constitute theft.

14 That first sentence there, theft of records
15 occurs when copies of the records are transmitted to
16 the unauthorized party even though the records remain
17 in the custody and control of the United States.

18 Then you go to the last paragraph that
19 starts off, in his chat logs, the Government states, in
20 his chat log the accused admitted to exporting the data
21 from the United States Government computer system on to

1 his personal computer and compromising the data by
2 conveying it to Mr. Julian Assange.

3 And then, if you turn to Page 16 at the
4 very top, right after the cite, they start off with,
5 conversion of computerized records as a misuse or abuse
6 of property. Its use in a unauthorized manner occurs
7 when an accused transfers information to an
8 unauthorized party.

9 Then they start the next paragraph,
10 conveyance of the United States Government records to
11 an unauthorized party constitutes conversion under
12 Section 641.

13 In the middle of that same paragraph they
14 say here, the accused converted the United States
15 Government records by conveying them to WikiLeaks.
16 WikiLeaks lacked the authority to possess this
17 information.

18 And they end that paragraph, in the instant
19 case the accused stole and converted the United States
20 Government records by transferring them to an
21 unauthorized party or onto his personal computer.

1 Additionally, this conveyance harmed the United States
2 interest and exclusive possession of the information in
3 the records thereby further adding to the conversion
4 caused by the accused.

5 They continue in the next paragraph.
6 Furthermore, disclosure of the United States Government
7 proprietary information creates criminal liability for
8 converting that information, specifically
9 misappropriating the information confidentially held by
10 one party is giving, by giving it to an unauthorized
11 party constituted interference with the right to
12 exclusive use of the compromised information.

13 And then they end at the very bottom of
14 Page 16. Thus, the accused substantially interfered
15 with the United States Government information by
16 compromising it to WikiLeaks.

17 The Court in its ruling in Appellate
18 Exhibit 615 specifically held that the Government
19 provided further evidence that the accused extracted or
20 removed the classified record and information therein
21 from the SIPRnet computer in the second BCC SCIF,

1 downloaded them to his own personal and digital media
2 platform, removed the portable digital media and
3 platform from the second brigade SCIF, transferred the
4 records and information therein to his personal
5 portable digital media platform in his private housing
6 unit, and then transferred the records and information
7 therein to WikiLeaks.

8 The Court finds that this to be some
9 evidence of misuse of Government records that could
10 substantially -- seriously and substantially interfere
11 with the Government's property rights to control the
12 charge records and information therein to withstand a
13 motion for a finding of not guilty under RCM 917.

14 And then on the bottom of that, Court says,
15 the Government's theory is that the accused knowingly
16 converted the records and information therein in
17 Specifications 4, 6, 8 and 12 by sending them to
18 WikiLeaks.

19 The Defense's position then is based upon
20 what the Government represented to the Court for the
21 917 and the Court's findings based upon that, that here

1 now clearly the 641 offenses and the 793 offense, the
2 641 offense and 1030 offense rests on the exact same
3 conduct.

4 And it's part of that ongoing conduct.

5 Clearly it would survive a unreasonable multiplication
6 of charges and findings based upon different elements.
7 But for sentencing this is the Campbell case. This
8 is -- in order to have given them to an unauthorized
9 individual, you had to have taken.

10 So the Defense's position is that, for each
11 of er the 641 offenses, they should merge either with
12 the 793 offense or with regards to the Category 2, 641
13 should merge with the 1030A1 offense.

14 THE COURT: And this is interesting,
15 because we have steal, purloin or knowingly convert.
16 So the Government is basically going forward on two
17 theories that he stole it, and once it got on his
18 personal computer, the offense was complete in the
19 conversion.

20 So you are really arguing to me it's the
21 conversion piece that makes this unreasonable

1 multiplication of charges for sentencing?

2 MR. COOMBS: Yes, but then also slightly in
3 a vacuum, not knowing for sure without the specific
4 findings, if the Court found that it was -- what the
5 Government proved for the 641s was a conversion, or if
6 they proved a theft, and if so, when that theft
7 occurred?

8 Was it when he actually did something that
9 would violate the exclusive possession of the property,
10 the Government's in its exclusive possession, or when
11 he took it to his CHU, as opposed to keeping it in the
12 SCIF. Or, as the Court asked initially, was it when he
13 downloaded it in the SCIF with what the Court would
14 believe they found that with intent to permanently
15 deprive or temporarily deprive the Government.

16 So it depends on when that theft occurred.
17 But it's clear the Government went on both of those
18 theories and argued for the 917 to avoid a finding of
19 not guilty on the conveyance or conversion theory.

20 And because of how they argued that then
21 here now it's inconsistent to argue that those

1 shouldn't be merged for sentencing. Because they are
2 part of an ongoing course of action. And it is
3 certainly one that you can separate for findings, but
4 for sentencing this is the Campbell case. And Defense
5 would argue they should be merged.

6 THE COURT: How is this distinct from a
7 case where you have a BAH fraud? False claims that are
8 made and then you have subsequent larceny, because you
9 are accepting the BAH month after month after month.

10 Does the defense see any distinction
11 between those kind of cases or not?

12 MR. COOMBS: Well, in that type case, if
13 it's just the false claims and larceny I think those do
14 get merged, and that is kind of the Campbell case as
15 well for sentencing. If it's an ongoing larceny, then
16 the issue is, did the accused in that case or appellant
17 have to do something in order to continue to receive.
18 Because technically every time they get paid that extra
19 BAH or whatnot, that's a larceny.

20 Here I would see a distinction in that the
21 taking, the timing of the taking of the information,

1 even under the Government's argument of maybe a few
2 days difference or a month's difference, the timing of
3 the taking to the actual giving with each of the
4 offenses that my client has been found guilty of is a
5 matter of days usually. And some of that is a
6 byproduct of the environment that he's in and others is
7 just getting the information in a place where he could
8 give it, I guess.

9 But it's clear that is part of the ongoing
10 intent, intent to take that information was to give
11 that information. And the best example of that is, and
12 I know we have a, well, I don't know if the Government
13 really argued that with regards to Specification 16, if
14 that was ever given, but everything that was charged
15 was given.

16 So we don't have an example of information
17 that was taken but then never given. And so from the
18 Defense's position that would support the fact that
19 this is an ongoing course of action that's one of the
20 initial steps to take it. But then it's always
21 concluded with a giving of the information.

1 THE COURT: All right.

2 MR. COOMBS: Then, Ma'am, the final
3 category is the Category 3 offenses where Defense
4 argues the relevant 641 Specifications of 8, 12 and 16
5 should be combined with the Specifications of Charge 3
6 that coincide with them.

7 The Government concedes that Specification
8 16 of Charge 2 should be combined with Specification 4
9 of Charge 3 for sentencing. They dispute whether or
10 not Specifications 8 of Charge 2 should be combined
11 with Specifications 2 of Charge 3. And whether or not
12 Specification 12 of Charge 2 should be combined with
13 Specification 3 of Charge 3.

14 The Defense's position is the obtaining of
15 the DABs in Specification 8 or the cables, the
16 purported cables from the Net Centric Diplomacy
17 Database in Specification 12 were both accomplished by
18 using the Wget program of Specification 2 and 3. And,
19 therefore, those two offenses should combine. Because
20 that was the means in which to obtain the information.

21 Again, part of the same logic under

1 Campbell of an ongoing course of action. This was just
2 simply the first step in that to obtain the information
3 to use the program that the Court found was an
4 unauthorized program.

5 THE COURT: All right. Thank you.

6 MR. COOMBS: Thank you, Your Honor.

7 THE COURT: Government, go in the same
8 approach, same order.

9 MR. FEIN: Yes, Ma'am. If I may brief from
10 counsel table.

11 First, Your Honor, it is the Defense's
12 motion to merge Specifications 4 and 6 of Charge 2 for
13 findings CIDNE I, SigActs for CIDNE-I and CIDNE-A.

14 First and foremost, Your Honor, with few a
15 clarifications, there is no evidence, Your Honor, that
16 Pfc Manning, in this court martial, that Pfc manning
17 burned on separate CDs or on the same CD the SigActs
18 before he removed them from the SCIF. There is no
19 evidence one way or the other.

20 The only evidence presented is when the
21 information was likely downloaded. And that's in

1 Prosecution Exhibit 116. That is the Stipulated of
2 Expected Testimony or the testimony of Mr. Patrick
3 Hohfeld, which gives the dates of when the information
4 would have been pulled from the CIDNE databases, both
5 Tampa for the Afghanistan and Iraq database.

6 And then it's the testimony that is summed
7 up in the today's Stipulation of Expected Testimony of
8 when it was found in the SD card, when it would have
9 been created on his personal computer. But there is no
10 evidence of when it was physically removed. Just a no
11 later than date, which is 30 January, and no earlier
12 than date.

13 THE COURT: Does the Government agree then
14 the last written date basically doesn't make any
15 difference because it could have been last written
16 anyway.

17 MR. FEIN: It could be one of two places,
18 Your Honor, either on the personal Mac or on the SIPR
19 computer. The last written date doesn't tell you
20 anything else other than the last time the document was
21 last edited.

1 But the part, Ma'am, that should not be
2 lost here is that these two thefts, although they are
3 both thefts and they are both SigActs from CIDNE
4 databases occurred in completely separate manners using
5 different databases and over different periods of time.

6 First, the Court heard testimony that the
7 CIDNE-A database was downloaded from the Tampa server.
8 Pfc Manning had to reach back to Tampa because he did
9 not have physical access to the one in Afghanistan.

10 THE COURT: That all assumes that I find
11 that the intent steal was present when these databases
12 records were downloaded, right?

13 MR. FEIN: That's correct. But it still
14 goes to how it was done and the timeframe. So either
15 on the charge sheet, separate timeframe based off this
16 evidence -- as it was alleged.

17 So first that evidence goes to Tampa, the
18 Centaur log show the only time that information was
19 accessed. Then you have the CIDNE-I database, which
20 are a few days later. I'm sorry. I have that
21 reversed, Your Honor. But CIDNE-I was first and then

1 four days later, three and a half days later, CIDNE
2 Afghanistan.

3 Different times and information was finally
4 pulled. And then, yes, it was last written on one of
5 the two computers at that time. And then captured
6 within that encrypted cabinet file.

7 Sort of jumping ahead, Ma'am, but the
8 United States does agree that -- well, going to the
9 next, Specifications 5 and 7.

10 THE COURT: Before we do that, in 5 and 7
11 you agreed they should be considered as one for
12 sentencing.

13 MR. FEIN: Yes, Ma'am.

14 THE COURT: You don't agree with that with
15 Specifications 4 and 6.

16 MR. FEIN: The United States believes that
17 these are separate and distinct acts. Because although
18 they are focused on transmission crimes versus a theft
19 crime, that both of these -- start of the crime is
20 unauthorized possession. That's when a 793 begins.
21 Although it's focused on the transmission.

1 So that's why the United States argues for
2 findings purposes, they are separate and distinct acts.
3 But for sentencing purposes they should merge because
4 they, of course, the gravamen of the offense is
5 transmission. And there is not a dispute that they
6 were transmitted at the same time.

7 THE COURT: Is the gravamen of the offense
8 the transmission or the transmission of particular
9 pieces of classified information?

10 MR. FEIN: Well, Ma'am, it's transmission
11 of particular --

12 THE COURT: National defense information.

13 MR. FEIN: To someone who is not authorized
14 to receive it. Which is why for sentencing under
15 purposes, it seems it should merge.

16 Ma'am, going to the UMC for sentencing.
17 First and foremost, the United States continues with
18 its argument from before, as the Court ruled in
19 Appellate Exhibit 78, theft crime simply targeted to
20 prevent thefts, transmission crimes to transmission and
21 the argument really hasn't changed there.

1 THE COURT: That was the findings.

2 MR. FEIN: It was for findings. United
3 States argues that is no different for sentencing as
4 well. Separate acts. And the separate acts, Your
5 Honor, that are focused on offenses that are serious in
6 nature, each one distinctively.

7 The 641 offense is looking at entire, well,
8 portions of a database. And SigAct databases are the
9 GITMO databases or the Net Centric Diplomacy Databases.
10 And then transmission of only particular documents from
11 there, the more than the number for each of those.

12 There's no question that for sentencing
13 purposes, that Pfc Manning could retreated after the
14 theft, could have chosen not to do that. Specification
15 16. The Government only arguing can say that he
16 intended to, Government did argue, was intended to
17 transmit the GAL. But there is no evidence of that,
18 nor has the Government presented that evidence. He
19 could have stopped but chose not to. Which is like not
20 exaggerated for sentencing that Pfc Manning's criminal
21 liability for sentencing purposes be held greater.

1 These are serious offenses, Your Honor. Serious
2 offenses he has been convicted of and serious offenses
3 for sentencing as well.

4 THE COURT: Unreasonable multiplication of
5 charges analysis. Does the seriousness of the offense
6 come in to play?

7 MR. FEIN: Ma'am -- hold on, Ma'am. The
8 seriousness comes in play, second and third factors of
9 the (inaudible) factors as applied by Campbell. So if
10 it either misrepresents or exaggerates the accused's
11 misconduct, criminality, excuse me, or if it unfairly
12 increases his punitive exposure.

13 Seriousness -- it's not unfairly creating
14 more exposure for stealing a significant portion of
15 classified databases and then transmitting some portion
16 of those.

17 Now specifically to the Charge 3
18 offenses --

19 THE COURT: The Government said
20 Specification 4 should be unreasonable multiplication
21 of charges of Specification 16. What's the difference

1 between that and the other two?

2 MR. FEIN: Well, Ma'am, first and foremost,
3 if I may first talk about Specifications 2 and 3, it
4 might help explain the difference, at least from the
5 Government's eyes.

6 Specification 2 and 3 are essentially the
7 same except for completely different dates and the act
8 of introduction of Wget again onto the computer.
9 Introduction crime regulatory violation, do not
10 introduce unauthorized software.

11 The reason that does not merge with the
12 1030 offense in Specification 12 is because the
13 bypassing of security, although in this case Pfc
14 Manning did use Wget, they are separate and distinct
15 acts. One is introduction similar to theft analysis
16 and transmission. The other is bypassing --

17 THE COURT: Does the introduction have any
18 exceeded authorized access?

19 MR. FEIN: That's one of the different
20 ways, Ma'am. United States presented multiple theories
21 of how authorized access was exceeded. But Wget

1 allowed him to go onto the actual state server and go
2 around the web page. So, yes.

3 But Ma'am, so then, moving to --

4 CAPTAIN MORROW: Actually, sorry, if I
5 could interrupt Major Fein. Specification 12 is the
6 641 offense, Your Honor. And so what Spec 3 of Charge
7 3 is aimed at is the introduction of Wget that second
8 time on May 4th, which is the, which the evidence shows
9 that was what downloaded approximately 11,000 cables.

10 Spec 12 is the use of Wget in that
11 timeframe for that offense was, Wget was already on his
12 computer prior to May the 4th.

13 Does that make sense, Your Honor?

14 THE COURT: I'm not sure.

15 CAPTAIN MORROW: The evidence shows he
16 reintroduced Wget on May 4th. And that was for the
17 last essentially 11,000 Department of State cables from
18 March 1st and onward. The 250,000 number relates to
19 the purported cables that were released in the public
20 domain that go through February 28th, 2010. So
21 everything prior to February 28th, 2010, can go

1 forward.

2 The use of Wget was just those 250,000
3 cables, was the Wget file was on the computer prior to
4 May 4th. Does that make sense now?

5 THE COURT: Yes. So he reintroduced it.

6 CAPTAIN MORROW: Yes. He reintroduced it
7 on May 4th. Stole another 11,000 cables. And those
8 cables were on a file that was corrupted, not
9 ultimately released in the public domain.

10 THE COURT: All right. Is there anything
11 else with respect to this issue?

12 MR. COOMBS: No, Your Honor.

13 MR. FEIN: No, Ma'am.

14 THE COURT: All right. We have two
15 options; Option A, we can reconvene later on this
16 afternoon and I'll have a ruling for you. I'm looking
17 probably around 1700. Or, Option B, we can announce
18 the ruling tomorrow morning.

19 MR. COOMBS: Option B would be fine, Your
20 Honor.

21 MR. FEIN: We support that option as well,

1 Ma'am.

2 THE COURT: All right. The other issue is
3 the objections from the Defense on today's testimony
4 and the Government response to those.

5 I would like to have no more than a day
6 turn around on these issues, because we are going to
7 have them on a rolling basis. Can you have them to
8 me -- say 1800-ish. You have your response back at
9 2000.

10 MR. FEIN: If we get them, yes, Ma'am.

11 MR. COOMBS: Yes. We did object at each of
12 those points, so it won't be hard for us to put that
13 together. So i can actually probably get it earlier
14 once I leave here. I'll type it up and get it to the
15 Government. Definitely by 1800.

16 THE COURT: Okay. You can have Government
17 your response -- I don't want any long legal briefs and
18 analysis. Just here's the objection and here's
19 basically the category of objection that I'm doing.
20 Okay.

21 So what time do you want to start?

1 MR. FEIN: I thought previously in your
2 instructions that the portion you read from your
3 findings, your ruling, that you were going to develop
4 those categories. You want us to pin it?

5 THE COURT: I'm not developing categories.
6 I didn't say that. No. All I said was, you have
7 outlined -- we have had the Defense motion already.
8 You both weighed in on how you think the case law
9 applies. So I don't need long legal analysis. I think
10 the case law is set. It's just a matter of where the
11 facts fit.

12 So I'm really looking at what are you
13 saying factually and why do you say that and why are
14 you objecting to it. And then Government, if you
15 believe the facts support admissibility under RCM
16 1001(b)(4), let me know what those facts are. I don't
17 need a long dissertation of the law. You have both
18 given it to me.

19 What time tomorrow?

20 MR. FEIN: Can we have a moment?

21 THE COURT: Yes.

UNOFFICIAL DRAFT - 8/5/13 Afternoon Session

37

1 (Pause)

2 MR. FEIN: 10:00, Ma'am.

3 THE COURT: All right. Court is recessed
4 then until 10:00 tomorrow morning.

5 (The Court adjourned at 3:18 p.m.)

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